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ABSTRACT

The paper provides, in question and answer format, a summary of P.L. 99-372, the Handicapped Children's Protection Act of 1986. The law authorizes reimbursement of attorneys' fees to parents who prevail in administrative proceedings or court hearings. Legislation was needed because of a 1984 Supreme Court ruling (Smith v. Robinson) that individuals covered by P.L. 94-142, Education for All Handicapped Children Act, cannot also claim protection under Section 504 of the Vocational Rehabilitation Act of 1973 or other civil rights statutues. Questions deal with such issues as what fees and expenses can be awarded, conditions under which fees will not be awarded, criteria for determining whether a parent is "substantially justified" in rejecting a settlement offer, limits to the amounts that can be awarded, parent notification, information to be sought in the required General Accounting Office study, and protection of teachers and other educational agency employees against retaliation. (DB)

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Handicapped Children's Protection Act, P.L. 99-372

1986

Council for Exceptional Children
Department of Governmental Relations

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What is the Handicapped Children's Protection Act?

P.L. 99-372, The Handicapped Children's Protection Act of 1986, was signed into law on August 5, 1986. The law authorizes reimbursement of attorneys' fees to parents who prevail in any administrative proceeding or court action. Fees are recoverable in any hearing or court action filed after July 3, 1984, or in any administrative hearing or court action brought prior to July 4, 1984 and that were pending on that date.

Why was legislation needed?

In July, 1984, the United States Supreme Court ruled in Smith v. Robinson that when an individual's rights are covered under P.L. 94-142 they have no protections or legal course of action under Section 504 of the Vocational Rehabilitation Act of 1973, or other civil rights statutes. The rationale of the court was that P.L. 94-142 was passed after Section 504 and is more detailed and specific; thus, the Congress must have intended for it to be the prevailing policy.

Under P.L. 94-142 there was no legal authorization for the courts to award parents who prevail in court any reimbursement for the costs they incurred in pursuing their actions or proceedings. Historically, parents going to court sued under both P.L. 94-142 and Section 504. Since attorneys' fees were reimbursable under Section 504, the court could choose to order such payment if the parent prevailed. Smith v. Robinson eliminated Section 504 as a course of action and thus, there was no authority for the courts to award the payment of fees. Many believed, including CEC, that this severely constrained parents' ability to exercise their judicial rights under P.L. 94-142. Secondly, since P.L. 94-142 and Section 504 were designed to work in tandem, it was believed that the loss of Section 504 and other civil rights statutes as a course of remedy would severely limit the ability to enforce the educational rights of handicapped children.

In an dissenting opinion on Smith v. Robinson, Associate Justice William Brennan wrote:

> The Court's conclusion that the EHA repealed the availability of sections 504 and 1983 to individuals seeking a free appropriate public education runs counter to well established principles of statutory construction. It finds no support in the terms or legislative history of the EHA. And most important it undermines the intent of Congress in enacting both sections 505(b) and 1988 ... [W]ith today's decision coming as it does, the handicapped children of this country whose difficulties are compounded by discrimination and by other deprivations of constitutional rights will have to pay the costs. It is at best ironic that the Court managed to impose this burden on handicapped children in the course of interpreting a statute wholly intended to promote the educational rights of those children.

(Over)

Despite the immediate introduction of bills to reverse this court decision two years elapsed before legislation to remedy the Smith v. Robinson decision was actually enacted.

Wat are the major provisions of the Handicapped Childrens Protection Act of 1986?

The major provisions of the law are:

- Statutory rights repealed by the Smith v. Robinson decision have been reversed, by providing that Section 504 and other statutes are reestablished as concurrent but separate vehicles for ensuring rights of handicapped children.

- Courts are authorized to award reasonable attorneys' fees to parents of handicapped children who prevail in all due process administrative proceedings and court actions brought under P.L. 94-142.

- The General Accounting Office (GAU) will conduct a study of the impact of the law.

What fees and expenses can be awarded?

Parents may be awarded reasonable fees for legal services performed and those expenses incurred in providing adequate representation. Such expenses may include evaluations and assessments, witness fees, transcripts, depositions, clerical and telephone costs, travel expenses, and paralegal fees. Both publicly funded and private attorneys' are awarded the hourly rate prevailing in the community for similar services.

When can fees and expenses be awarded?

Fees can be awarded when parents "prevail" in a hearing or lawsuit. To "prevail" means that the education agency makes a change in the child's educational program as a result of the parents action. The amount of the award can vary depending on the number of successful requests. If several requests are presented in a hearing or court action and substantial changes are made by the educational agency, the fees would not necessarily be reduced because all requests are not adopted. However, when only limited results are obtained, the award would be prorated to reflect only those fees related to the results obtained.

How can fees be applied for?

After results have been obtained, parents, through the attorney should submit a request to the LEA or SEA for reimbursement of fees and expenses. If a favorable agreement can not be reached, parents must petition any state court or any United States district court for reimbursement of fees. In a civil suit, parents may request fees as part of the civil action.

When will fees not be awarded?

The law outlines four specific conditions under which the court may deny an award of fees.

- if the offer is made within the prescribed timelines set forth in Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative hearing, at any time more than 10 days before the hearing begins;

- the parent does not accept the offer within 10 days;

- the relief finally obtained by the parent is found by the court or administrative officer to be no more favorable than that contained in the settlement offer; and

- the parent was not "substantially justified" in rejecting the settlement offer.

What criteria determine whether a parent was "substantially justified" in rejecting the settlement offer?

In the conference report, U.S. Senators John Kerry (D-MA) and Paul Simon (D-IL) offered five factors which may effect the parents decision to reject an offer:

- It was not clear that the relief offered was as favorable as that obtained either in a hearing or in court;

- The relief offered was contingent on some implicit or explicit factor, such as the availability of appropriate staff or funds;

- The offer did not include a mechanism for implementation of the preferred relief;

- The relief offered was more general than the specific relief finally obtained; and

- The parent had inadequate opportunity for discovery in order to ascertain the scope of possible violations or the scope of the needed relief.

Is there a limit to the amount of fees that can be awarded?

The law states that any fees awarded must be reasonable and based on prevailing rates within the community and without the use of a bonsus or multipiler. In addition, three circumstances are delineated under which the amount of fees is reduced:

- the parent unreasonably protracts the final resolution of the controversy

- the amount of attorneys' fees to be awarded unreasonably exceed the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation

- the time spent and legal services furnished were excessive considering the nature of the action or proceeding.

The law further stipulates that if the education agency unreasonably protracts the final resolution or has violated the procedural safeguards under Section 615 of P.L. 94-142 these circumstances are void. States and local education agencies can limit the fees awarded by offering a swift written settlement within the guidelines prescribed by the law and P.L. 94-142.

Can federal money be used for awarding attorneys' fees?

The law stipulates that P.L. 94-142 funds can not be used to pay fees.

Are there time lines for reimbursement of fees?

Timelines for reimbursement are not included in the law. Since the law is considered a "fee shifting statute," it is expected that the timelines for attorney reimbursement will be set by the court according to customary practices.

Does the law effect the use of mediation?

Mediation is considered an informal procedure and is therefore not considered a due process procedure or safeguard as outlined in P.L. 94-142, however informal mediation is not discouraged under the law.

Can both the LEA and SEA be required to pay fees?

In actions or proceedings in which more than one LEA or SEA have been named as a respondent, it is expected that the award of fees and expenses be based on the relative culpability of the agencies.

Must parents be notified of the new law?

The law is silent on this issue. However, Section 615 of P.L. 94-142 mandates that parents be notified of due process rights and procedures.

What information will be sought in the GAO study?

Yes, Congress has authorized the GAO to conduct a study surveying the effect of the new law. Data retroactive to July, 1984, will be collected from all states and a representative sample of states. Data will include, but not limited to:

- the specific amount of fees, costs, and expenses awarded to the prevailing party;
- action or relief taken in each case;
- range of costs categorized by type of complaint;
- hours spend and expenses incurred by education agency personnel, attorneys, consultants, and parents in each state; and
- methods of informal complaint resolution.

Are teachers and other employees of the educational agencies protected against retaliation?

The law does not specifically address the issue of retaliation, but the intent of Congress was noted in the conference agreement:

> ...no person [SEA, LEA IEU, or any official or employee thereof] may discharge, intimidate, retaliate, threaten, coerce, or otherwise take an adverse action against any person because such person has filed a complaint, testified, furnished information, assisted or participated in any manner in a meeting, hearing, review, investigation, or other activity...

Will the U.S. Department of Education provide regulations?

At this time the Department has taken the position that the law is self-executing and has no plans to issue regulations or guidelines for implementation of the law.

Additional note

The legislation is based largely on other fee shifting statutes and legal precedents. It is expected that decisions will be made on a case by case basis.

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